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**Mount Sinai Hospital and New York State Nurses Association.** Case 2–CA–36487–1

February 7, 2005

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 30, 2004, the General Counsel issued the complaint on October 22, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to bargain following the Union’s certification in Case 2–RC–22844. (Official notice is taken of the “record” in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.<sup>1</sup>

On December 3, 2004, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On December 7, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its contention, raised and rejected in the underlying representation proceeding, that the case managers who constitute the certified unit are managerial and supervisory employees, and therefore the unit is inappropriate.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine

<sup>1</sup> The Respondent’s answer denies knowledge or information sufficient to form a belief concerning the filing and service of the charge. The answer, however, admits that the Respondent received copies of the charge filed on August 30, 2004. In any event, copies of the charge and the certificate of service are included in the documents supporting the General Counsel’s motion, showing the dates as alleged, and the Respondent does not refute the authenticity of these documents.

the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, an acute health care institution, with an office and place of business at 1 Gustave Levy Place, New York, New York, has been engaged in the business of providing health care services to the public. Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of \$250,000, and purchases and receives at its facility goods and services valued in excess of \$5000 directly from suppliers located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.<sup>3</sup>

**II. ALLEGED UNFAIR LABOR PRACTICES**

*A. The Certification*

Following the election held July 21, 2004, the Union was certified on August 11, 2004, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

*Included:* All full-time and regular part-time case managers employed by the Employer.

<sup>2</sup> Neither Chairman Battista nor Member Liebman participated in the underlying representation proceeding. However, they agree that the Respondent has not raised any new matters or circumstances warranting a hearing in this proceeding, and that summary judgment is appropriate.

Member Schaumber dissented from the denial of the Respondent’s request for review in the underlying representation case. He would have granted review on the issue as to whether the case managers are managerial employees. While he continues to be of the view that review was warranted, he finds that the Respondent has not presented any new matters that would warrant denial of the Motion for Summary Judgment.

<sup>3</sup> The Respondent’s answer denies sufficient knowledge or information regarding the Union’s status as a labor organization. The Respondent, however, did not challenge the Union’s labor organization status in the representation proceeding. Accordingly, we find that the Respondent’s answer does not raise any issue warranting a hearing with respect to this allegation. See *All American Services & Supplies*, 340 NLRB No. 37 (2003).

*Excluded:* All other employees and guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

#### B. Refusal to Bargain

On about August 16, 2004, by letter, the Union requested the Respondent to bargain, and, since August 25, 2004, the Respondent has refused to do so. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By refusing since August 25, 2004, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

#### ORDER

The National Labor Relations Board orders that the Respondent, Mount Sinai Hospital, New York, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to bargain with New York State Nurses Association, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if

an understanding is reached, embody the understanding in a signed agreement:

*Included:* All full-time and regular part-time case managers employed by the Employer.

*Excluded:* All other employees and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 25, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 7, 2005

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with New York State Nurses Association as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

*Included:* All full-time and regular part-time case managers employed by the Employer.

*Excluded:* All other employees and guards and supervisors as defined in the Act.

MOUNT SINAI HOSPITAL